





Contracts.

Gould

(24.)

Wagering contracts by common law are in general valid. And it is not essential to such a contract that it be in itself contingent. It is sufficient if it is equally contingent or uncertain to both parties. *Couth 37, 2 S.R. 610.*
3 T.R. 693. ^{intended to elucidate the case of ignorance and error ante} Book 25 p 44,

Erroneous representations invalidate a contract in some cases and in others not. The rule is that if the circumstance misrepresented is the principal cause or inducement to the contract it is void but if it is not the principal inducement the contract is not void but the person misrepresenting is liable in damages according to the difference in value *1 Pow 147, 9, 2 Pow 196, 261, 1 Bes 401, 1 Bern 32, 2 Bern 175.*

But if the erroneous representations are fraudulent it always vitiates the contract.

If certain things are made necessary by the contract their erroneous representation as concerning those things will invalidate the contract *1 Pow 150.* The fact of assent to a contract may be inferred from circumstances some authorities

Mr Powell says if an unsound article is sold for a sound price which it could not have been worth if it was not sound then want of consideration may be implied *1 Pow 150,* Judge says this rule is incorrect see *Couth 113, Doug 23, 1 T.R. 133, 3 T.R. 757, Peat Cas 115, 123, 1 Pow 142, 2 East 314.* But this has indeed been determined in this state that if a thing is sold for a sound price when it was unsound damages might be recovered but has lately been contradicted by one or two decisions how it is settled I do not know see *2 Root 417, 2 Swift 128, 160.*

We now proceed to consider the subject of a contract ^{most} of what subjects contracts may be made ^{on this subject} There is a diversity in the law arising from contracts ^{executed} being executed or executory.

By an executed contract is meant one which is finished and nothing further to be done

An executory contract is one to be performed in future. By a contract executed a person cannot transfer any thing in which he has not an actual or potential interest at the time of the contract. Pow 432, 1 Pow 152, Root 132, 1 Inst 309.

For example a grant that to which he has an inseparable title only, it is descendable, leasable and in equity assignable. 4 T.R. 44, 1 Pow 135, Term. rev. 44154, 1 Barb 293, 3 J.R. 48, 1 H. Bl. 3, When there is an actual agreement ~~to deliver~~ although the property is not delivered it is an executed contract Pow 432, 1 Pow 154-5,

But if a person has a potential interest in a thing he may transfer it and the contract will be binding at potential interest is when he owns the thing from which the thing contracted for is to arise. Root 132, Pow 156-7.

But by a contract executory a person may bind himself to convey what he does not now possess and if he fails to perform damages may be recovered although a court of equity would not decree a specific performance if it was impossible for him to perform it. 1 Pow 158-9,

But if a contract is completed so that no further act is necessary it is an executed contract and there must have been an actual or potential interest to pass by the contract or it is void. 2 Bl. Com. 443, 1 Pow 159, 234,

But if the contract is so framed as to operate as an estoppel it will bind him, not on the ground of contract executed but because he is estopped from saying he had no interest at the time of the contract by his covenant of sesin. 2 Bl. 295, 1 Root 222, that this rule holds as to leases see Salk 276, ~~See~~ Ray 279, 104 A, 153, 3 J.R. 370, Pow & Mort. 295-6 as to Mortgages see Pow & Mort. 47, 2 Verm 11, 1 Barb 760 as to Freehold estates 1 Pow 160, 3 J.R. 370, Litt. rev 440, 1 Inst 265, 2 Bl. 295,

There are three requisites to a good contract - 1st That

3

it be possible to fulfil. 3^o certain the first
requisite is that it be possible of performance
No right is acquired or lost by a contract that is
naturally impossible of performance 1 Pow 166.

17^o, 1 Roll 420, 1 Inst 206, Perkins sc 95,

We are treating of impossible stipulations and
not of impossible conditions.

We must distinguish between things in themselves
impossible and those impossible on account of
the inability of the person performing. Those of
the latter kind are binding L^o Ray 1105, 1 Pow
16152

There is a plain difference between them. in the
first case it was in the knowledge of both the
parties contracting that it was impossible at the
time and in the other not.

There are two cases in the books which appear to me
to be decided right though for quite different
reasons ~~from~~ those given by the court and indeed
I think the decisions are not supported by the reasons
given One case is where a man bought
horse and agreed to give a farthing for the first
nail four for the second See. 2 L^o Ray 1164
6 Mod 305. 1 Bent 269, 1 Lev III, 1 Wils 295,
judge thinks that the express contract was void
on the ground of fraud and if so the law
waives an implied contract from the mes-
senger to pay the value of the thing received

That the value of the article is the rule of damages
See 1 Pow 408, 2 Bur 1010, 2 Sart 211, 1 Baon 217,

The meanness or remoteness of the probability is not
regarded in executory contracts but in executed
it is Pow 163-4,

And if one party covenants to perform an act
not naturally impossible his being prevented
from performing it by inevitable accident is
no excuse and does not avoid the contract

3 Bur 1639, 1 Fonb 366, Doug 259, but if im-
possible in the nature of things the contact is void

(95) Contracts shall be lawful i.e. the thing stipulated to be done must be lawful 1 Pow 104-5,
Unlawful Contracts are either malum prohibitum
or malum in se. Contracts are malum in se
when they are contrary to the material or moral
Law, 1 March 163, 1 Fosc 213, Compl 39.

Contracts are unlawful when they are contrary
to the law of the land and this they may be
in several ways 1^o When they militate against
the public welfare 2^o When they are opposed
to some rule of the law 3^o When they are
opposed to some statute 1 Pow 166, C. 49, 20 Will
34, 3 & R 17, 22-3, 7 T R 5-3, 8 T R 89, 13 & Eliz 272.
All contracts in restriction of trade are unlawful
and void as if one should contract not to follow
any trade or not to follow a particular trade
Robert 211, May 292, C. 81c 8, 7 R 1 Pow 166-7,
And the rule is general that all contracts which
militate against the public welfare are in general
void. 1 H. Bl 322-7, 7 T R 543, 8 T R 89,
That a Contract not to follow a particular Trade
is void see 1 Coke 53^b 7 T R 543, Cro Pow 396,
1 P. W. 181,

But an agreement not to exercise a particular trade
in a particular place may be good for it may
be for the public benefit Cro Pow 596, 2 Buls 136
Palmer 172. But such an agreement must
be on a sufficient consideration and the
onus probandi as to the consideration falls
on the person claiming under the contract
Ibb 739, Palmer 172, 1 P. W. 181, 192, 10 Mod 27,
85, 120, 1^o is immaterial where a person agrees
generally not to pursue a trade whether he is
of that particular trade himself or not
1 P. W. 192, 1 Pow 167,

On the same principle of its being against
the public welfare a Bond or contract to
support maintenance is void 4 Bl 138,
1 Pow 172,

On the same principle a contract with an
alien enemy is void 2 Roll 173, 1 T R 45, 8 Geo 48, 1 P. W.

So an insurance on the property of an enemy 5
is void because of the interest which the insurer
has to protect the enemy's commerce. 2 & R. 5-48
6 I.R. 35, 1 B&C P.345, 1 East 16475, Doug 234,

But this rule is not universal thus a ransom
contract with an enemy is good. This is a contract
to pay a sum of money for the ransom of a
captured ship. But this contract must be enforced
in the Admiralty Court and cannot therefore
be enforced until the conclusion of peace
Mark 2.432, 608, 37, 3 Bull 1734, 1 Bl. R. 563, Doug
619, 6 I.R. 23. A hostage is generally given as
security but if he dies the contract remains.
Doug 619,

And indeed all contracts in general made
made with an enemy and arising out of a
state of war which tend to mitigate the evils
of war are binding. On this principle treaties
of peace and contracts to exchange prisoners
are binding Doug 619.

But in England by 2 & C. 5th no ransom contracts
are prohibited. Mark 2.432,

On the same principle of its being against public
welfare marriage brokerage contracts are void
Show. Parl. Cos 96, 1 Foss 245, 1 Bull 174-5, 812 Dig
184, 3 Lev 411, 1 Pow 174, to 190,

2⁵ Again contracts opposed to any principle of
the law are void. e.g. a promise to an agent
to pay him a sum of money if he would
discharge a debt due to the principal is void
3 Balk 97, 1 Bull 34, 1 Pow 176,

So a promise to pay a sheriff a sum of money
if he will suffer an escape is void 10 Coke 76,
103, Cos 812 199,

So also a promise by a minister of justice to do
an unlawful act is void and it is immaterial
whether the action is brought for the non-perfor-
mance of the act or to recover the consideration for
doing it in neither case can it be sustained
Loring, it in neither case can it be sustained
Cos 812 237, 1 Pow 176,

Where the fact that makes the consideration
unlawful is unknown to the promisee the
contract may be lawful - - - - -

6 As if a sheriff should arrest a person unlawfully
and bring him to an inn keeper to keep for a
time and the inn keeper should keep him not
knowing that he was unlawfully arrested
he may recover a compensation from the sheriff
Ex Jan 75 L, Nutt 53, 1 Pow 12758,
again contracts which militate against morality
or decency are void. Couth 39, 727, 735, 1 Pow
143, 233, 2 T R 610, 3 T R 693,

hence also a wager that I shall not be elected
to a certain office is void. March 3. 96, Couth
39, 1 Pow 182, 2 T R 610,

so also a wager with a judge concerning the
decision of a suit is void 1 T R 56, 1 Pow 184,
so also a wager which is a mere cloak for
swearing is void and all this because they are
against public policy &c 1 T R 56, 13, 1 Pow 184
It is a general rule that a wager against
public policy is void but a wager between the
Debt & Debtor in a suit concerning the decision
is good. Couth 37, 1 Pow 184,

Wagers in general as observed yesterday are
good on actions or a suit on their own or
at least upon a misnomer disconveniency by whom
March 96, 2 T R 610, 3 T R 693,

In this rule regarding wagering contracts are all
wager and also money sent lawfully to give
which cannot be recovered back Stat 10 & 11 Eliz 1.
Contracts made in fraud of third persons are
immediately void and never can be ratified
Ex Dig 184, Doug 435, 450, 2 Pow 165, 170, Talk 156,
6 T R 166, 1 W Bl 322, 656, 2 T R 763, 1 Br R 246,
4 T R 166.

On this principle in marriage settlements a
secret agreement by one of the parties to refund

a part or all of the marriage portion is void.

Ex 246, Exm Dig 184,

so also if the owner of goods to be sold at auction
employs a bidder the contract with him is void

1 Pow 186,

Contracts again are unlawful and void where
the objects of them tend to encourage unlawful
acts or commissions of any kind as a Bond
given to a printer to indemnify him for

publishing a libel. Hobart 12, Moor 356, 1 Pow 195-6, 7
So bonds for compounding a felony are void.
But if the offence amounts only to a misdemeanour
it is said they are not so. See 643, 7 & R 475,
2 Wils 641.

A wager between two persons that one of them
will or will not do a criminal act is void
1 Pow 198-9,

(96) I observed yesterday that contracts contrary to the
statute law are void.

Agreeable to this rule contracts contrary to 12th Ann
for illegal interest are void 1 & R 736, 6 & R 499,
1 Pow 186, 166,

There is a distinction between Bonds for the
performance of covenants or conditions which
are made void by the Statute Law, and those
which are contrary to the common law.

If there are any of those covenants or conditions which
are void by Statute in a Bond the whole Bond
is void the bad part vitiates the good. But if the
covenants or conditions are made void by common
law then the void covenants or conditions are only
void and the rest of the Bond good 2 Wils 351,
1 Bent 37, 1 Pow 199,

If a Bond reserves unusual interest the whole bond
is void although there are other conditions that are
good. But if the High Sheriff should take a Bond
from his deputy conditioned to save him damages
and also conditioned not to serve any writs
only to a certain amount the last condition
would be void at common law but the other
condition and the remainder of the Bond would
be good. 1 Pow 200, 4 Bar 438, 1 Bent 37, 2 Wils
351.

This distinction is generally considered as
arbitrary. I think however it arises from the
construction and phraseology of statute law
which says the Bond shall be void and not
from any inherent difference between Com-
mon & Statute Law.

But there is an legal contract under which that
can be enforced yet sometimes if they are executed
the court will not set them aside.

8 The rule is this, if both the parties to the contract
are "parties criminis" and the criminal act contemplated
by the contract is committed the sum paid as a consideration
for it cannot be recovered back. *Sang.* 451 or 468, *Bul. I.P.*
131-2, *Sack. Lb.*, *4 J. L.* 578, *1 B. & P.* 9, *298*, *Cough.* 770,
2 Beck. 1712.

But where an illegal contract remains unexecuted
as to the criminal act the money paid as a consider-
ation for the illegal act may be recovered back. *Bul. I.P.*
132, *Sang.* 471, *1 Dow.* 282, *206-7*.

L'Estamphieil seemed disposed to question this distinction, and
it appears to me to be opposed to principle. *7 I.R.* 535 but
the rule is well settled.

If an illegal wager is void and the money is depos-
ited with a stake holder if he pays it over with the consent
of the loser to the winner it cannot be recovered back
6 I.R. 575, *1 B. & P.* 9, *294*, *Fang.* 676 note

but if it has not been paid over either may recover
the part he deposited and this although the risk has
been run and the illegal act committed. *5 I.R.* 405

3 East. 222, *contra 4 Johns.* 426.

But if the stake holder pays the money to the winner
without the losers consent can it be recovered back

See *2. Root's Report*
and *1 Lb.* *Eng.* 9, *5 I.R.* 609, *1 B. & P.* 297, *1 H. Bl.* 64,
3 Bl. R. 1075, *2 Dills.* 309, *Eur. Dig.* 15,

Under our Stat. 361, it may be recovered back.

There is one case in the English Books where the money was
recovered back after it had been paid over with the
consent of the loser *7 & 8 R.* 535 see also *1 East.* 98, *4 Johns.* 26
On the same principal money paid to procure

an office may be recovered back at any time
before the office is procured *Fang.* 471, *1 Dow.* 202-6,

Again. But if the party who has paid ^{the money} on the illegal
contract was not parties criminis he may recover
it back although the contract has been executed
on the other side and the illegal act performed
as in the case of *Young* *Cough.* 791, *Fang.* 451, *671*,
Stray. 15, *4 J. R.* 561, *Bul. I.P.* 132, *1 H. Bl.* 65, *1 Fong.*
218, *235*, *contra Sack.* 22,

A promise made in consequence of a previous agreement to do an act contrary to positive law which agreement had been executed is good as if A and B ~~had~~ agreed to smuggle which they do and lose money in the transaction.

A pays the whole of the loss and takes a security of B to repay his half this security is good for the promise is nothing but to repay a sum of money. 4 Bar. 2067, 3 D.R. 418, 2 N. Bl. 374, Watson, partner 1 K.B. 6 T.R. 61, 405, 7 T.R. 630, 2 B. & P. 272-3.

And it has been held that if one pays with the priority of the other the law will raise a promise so that he may recover. 3 T.R. 418;

But now it is not law 2 N. Bl. 371, 6 T.R. 61, 405, 7 T.R. 630, 2 B. & P. 272-3, 3 Ves. Jr.

If one pays money so lost without the priority, and demand of the other he cannot recover it back. 2 N. Bl. 374, Marsh J. 412-4,

If one makes a contract the making of which is illegal he may be bound although he can not claim under it as if a Clergyman should trade and make a ~~bill~~ " of exchange he is liable on the Bill although the his making the Bill was a criminal act. So also a smuggler is liable to the Bankrupt laws although his trading is criminal.

A regulatory contract is of course void as is not to strike. 1 Pow. 2515 b,

A contract which evidently applies to others than third persons is void e.g. one which tends to induce indecent visit or concerning a third person. 6 Pow. 729, 135, 3 D.R. 699, 1 Pow. 232-3,

The third requisite to a good contract is that it be certain. Hence if A promise to deliver goods to B in a short time the promise is void for uncertainty. 1 Pow. 92, 97, 600, Pow. 250, 1 Pow. 182,

Still however a promise to pay money without naming any time the promise is good and the money payable immediately 7 T.R. 124, 427 But if the promise to do any collateral act i.e. any other than the payment of money and no time is mentioned he has his whole life time to do it in. 1 Pow. 182.

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= But notwithstanding this it is a maxim that
that is certain which can be rendered certain
by any known standard. Pop 144, 1 Pow 180,
Bro. Chas 194, 1 Feb 56, 60.

(97) Contracts are of two kinds Executed and executory
An Executed contract is one by which a present indefeasible or vested right of future possession is conveyed.
An Executory contract is one whereby no property passes
immediately but is preparatory to a future transfer and
and consummation 2 Bl. 445, 1 Pow 285,

Or it is one where one performs immediately and
the other is trusted or where both are trusted Pow. 16.
express implied and constructive

Mr. Powell distributes contracts in to ^{and unexpressed, & may express and implied are} ~~one~~ ^{one} ~~superlatine~~ 1 Pow 286 one all.

They are covenants which he calls constructive. e.g.,
in a covenant he, "whereas I or am possessed" he calls a constructive covenant that he is
possessed of the thing but it amounts to an express
covenant Bro. Jan 187, 668, 160. 120 24
May 14, 1 Leon 120, 2 Eng Gas 652,

So also an exception in a deed intended may amount
to a covenant. This Mr. Powell calls a "constructive
covenant" but it is an express covenant that the estate
or thing excepted shall not pass Bro. Ediz 657, Pow
17, 1 Leon 117, 1160 & 60,

So also a reservation of rent in a lease is an express
covenant to pay it Bro. Ediz 657, Stra 407, 1 Rent 10,
Bro. 63 399, Pop 156-7, 1 Coll 578, [Robert 132, 1 Leon
246, 1 Pow 245-6]

Implied contracts are the other kind and are those
which are neither expressed in terms nor arise
from the construction of the language used
but those that arise from the negotia or the
nature of the contract as if A orders goods to be
sent him by B, here the law raises a promise to
pay for them 1 Pow 245-6,
The action of indebitatus auctus which is founded
on this implied promise or contract. 1 Pow
255-6, Pow 15, 1 Dan. or 20 322, 2 Bl 36.

Indeed Implied contracts are nothing more nor less than contracts not express for they are convertible terms
If a lessee holds over there is an implied contract
that he shall hold for another year at the same
rent 1 Pow 155, 258,

A purchaser of lands becoming bankrupt and only
part of purchase money paid Equity will imply a
covenant that the land shall stand charged to him
for the remainder, 1 Bro Ch 423, 3 Atk 272, 1 Pow 257-8,
but if a security has been taken that will make the contract
express to rely on security 1 Bro Ch 423,

Contracts are absolute or Conditional

^{Absolute} Absolute where one binds himself or property uncondi-
tionally as if one in consideration of a lease promises to
pay rent

^{Conditional} Conditional where the obligation depends entirely

or in part on an uncertain event by which the
contract may be suspended enlarged defeated
or qualified 1 Pow 259, 2 Bl 152, 1 Inst 201,

Instances of conditional contracts 2 Bl 154, Shaw, Parl. Cas.
A.B., 1 Inst 201, Park sec 71^b, Dyer 91^b, 1 Pow 261,

As to unlawful conditions, the effects of them are different
according to the nature of the contract

1^o If the contract is executory the condition being
unlawful the whole Bond or contract is unlawful
and void 1 Inst 200 & 8th Dig 175, 182-5,

The reason is because the contract is executory and no
one can require a right of enforcing it by doing
an unlawful act

The rule is the same if the condition tends to encourage
unlawful acts or omissions, 8th Dig 175, 185, 2 Bent
109, 2 Wils 344, 3 Levitt 11,

So also if condition be against public policy 8th Dig
183-5, 1 P.W. 181, 4 Bar 22 & 5,

But on the other hand if an unlawful condition be
 annexed to an executed contract the condition
only is void and the conveyance grant or contract
is good and absolute. The reason is the law is
not required to enforce such a contract for

It is agreed already it is enacted. If we make a present to another in consideration of an instrument and the condition and is void and the agreement good for this is an executed contract.
2 Bl 157, 1 Inst 206^b, 1 Bew 261-2,

But although the effect of an illegal condition in an executed and an executory contract is different still the object is the same i.e. to take away all inducement to the commission of crimes or the violation of the law.

But the rule as to executed contracts holds only where both parties are ^{in pari delicto} for if they are not the innocent party shall be aided. e.g. Usury.

The principal on which these cases depend is this that the law will not aid a criminal party nor permit any inducement to violate the law.

Bonds in restraint of marriage are void because executory, 4 Bur 2225, Err 2d, 1 H 3-4, 2 Bent 109
2 Wils 344,

Any contract to induce an immoral act is void otherwise if the condition had been executed and the bond given in consideration of its being exec'd
3 Bur 1564, 1 Bl R. 517, 3 Wils 339, 2 P. W. 432,

All conditions totally repugnant to the nature of the contract are void as a condition in a conveyance that he to whom the estate is conveyed shall not alien or take the profits but a distinct bond that he will not alien or take the profits is good because by aliening he will not forfeit the estate but merely the penalty from authorities

(98). Impossible Conditions

Are of two kinds, those impossible at the time of making of the contract and those ^{not} impossible at the time but become impossible afterwards.

First of conditions possible at the time, known impossible afterwards
if it is annexed to an executed contract the contract will remain good and the party discharged from performing the condition 1 Inst 206^b, 1 Bew 2675,
2 H 4-6, 10. Inst 264, 1 Cal 13, but by the way

The condition is supposed to become impossible by the act of god, for if it is by his own act the contract is void, he cannot take advantage of this even wrong. 1 Dow 423, 1 Inst 210²

Reason why cont't god in first case is because it is executed and cannot be levied without the promisee's consent.

So also where condition to execute cont' becomes impossible by act or operation of law 2 P. N. 288, 3 Brad. Part. 3 179, 5 D. 267, Talk, 193, & Nat 51,

So also if rendered impossible, by the act of the party claiming by reason of the non performance of the same authorities. But if by act of other party the contract void.

But if a possible condition is annexed to a contract executory, and afterwards becomes impossible by act of god. the law see, the effects are direct by the reverse i.e. the contract is void or the obligation saved. 1 Dow 265, 477, 423, Talk 172, 1 Fumb 209, 7 I.R. 284, 12 R. 634, 27 N. 6, 126-8,

Reason is, the contract being executory it can be executed only by an action at law, and the act being impossible without his default the law will not subject him for not doing an impossible act.

But if the render himself incapable to perform the act he is immediately liable although the time of performance has not arrived. 3 Coke 21, 1 Esp. Cas 430, 2 Esp. Cas 522, 6 Johns 110,

To illustrate the above reason. A person gives a bond conditioned that he will appear as a witness and dies before time the obligation is saved so a bond to marry A. B. marries another person obligation saved same authority. and 20 R. 240, 8 Coke, 168, 374, 1 Inst 606,

In an obligation conditioned to build a house in a limited time and is prevented by obligee the obligation is saved. 12 Doug 628, Doug 659, 2645, 39 R. 590, 75 N. 383, 1 East 619, 1 Esp. R. 53,

But if the obligation annexed to an executory cont' be to inform one of two things one of them becoming impossible does not discharge the obligee 16 & 17 P. 242

It was formerly thought different 1 Pow 392, 6 Coke 22,
48 Mod 26, Clark 170,

So if an obligation becomes partially impossible the rest
must be performed. this is the doctrine of *si posses*. i.e.
as much as may be. 1 Pow 384, 8 Inst 352, 219,
2 N Bl 163, 581, 2 Bl R. 371, 1 Inst 237, 211 & 2 S
& 254, 2 Pow 31.

Remark. the obligee is not bound to accept such
a performance (same authority)

So if a bond contains a clause making the party bound
a judge of performance the clause is void and the
jury must be the judges. See *Vane Rep* 408.

If the condition be impossible at the time of making
the contract its operation depends on it being Precedent or
Subsequent

A Precedent condition is one which must be performed
before the right or estate can vest.

Subsequent is one by which it may be defeated
2 Bl 156-7, 1 Inst 206,
If a precedent condition be impossible at the time of
making the contract. the whole contract is void ab
initio 2 Bl 157, 1 Inst 205, 1 Pow 266,

The effect I should think would be the same if the precedent
condition was possible at the time but became impossible
before performance but there are no authorities.

If condition be unlawful the rule is the same 2 Bl 157,

But if a Subsequent condition is impossible at the
time the condition is void and of no effect but the
contract is good and absolute because the law
supposes the parties never intended that an impossible
or unlawful thing should be performed 2 Bl 157,
1 Inst 236, 1 Pow 266,

And if a contract is executory and the impossible
condition subsequent the effect is the same and
the reason is the contract is executed in both cases
before the subsequent condition can affect it and
a void condition cannot defeat. 2 Bl 157,
But if the impossible stipulation in an executory
contract is in the body of the contract. the
contract is void in the whole. because the condition
must be in effect precedent 1 Coll 172, 1 Pow 264,

There was a distinction at common law between simple and Special contracts, but the Statute 29 Charles 2^o has introduced a further distinction unknown to the common law viz. between parol or written contracts not sealed, for the stat - see 1 Bae 72, 1 Pow 269, 2 Bl 466. Our Stat as far as it goes is substantially the same as, ^{3 Bl 159,} the English. Stat Con^t 354,

The operative clause is that there be some note or memorandum in writing made at the time and signed by the party or his agent.

The English statute affects six classes of contracts, ours only five viz

- 1 Any cont. by Exec^t or Test^t to answer out of ^{his} own estate for any debt or duty of their testators.
- 2 Any nomine by one to answer for the debt duty or default of another.
- 3 Any cont. in consideration of marriage
- 4 Any cont. for the sale of lands &c or any interest in them
- 5 Any cont. not to be performed in one year from the making of it.
- 6 In the English statute but not in ours Any cont. for the sale of goods of the value of ten pounds or upwards -- Shall be utterly void unless some note be made at the time &c. The last clause extends to executors & executors & Every contracts Robertson Fraud 111, 2 N Bl. 637 &c 14,

As to the 4th Clause, for the sale of lands &c any unsealed parol contract concerning them for not exceeding three years shall operate as a lease at will and by late decisions a lease at will is construed a lease for a year so that now a parol lease for less than three years would be construed a lease for a year & T A B, The object of the Stat is to prevent fraud and perjury in proving such cont. by parol evidence

(99) As to the first clause of the statute.

It has been said that if the Executor &c. has effects of his testator in his hands he is bound by his parol promise to pay a debt of testator out of his own estate but not now law, for if he has effects execution goes de bonis testatoris 1 Ves 126, 5 I.R. 8, Rob. 206, 7 I.R. 350;

The existence of a consideration will not make a parol promise in such a case binding a *fortiori* proof of effects will not, 5 I.R. 690, 7 I.R. 350-1 *Centra Corp. 28th,* but not law.

Submitting to arbitration it was once thought took a parol promise out of statute, but not law 12 R. 691-2, 5 I.R. 6, 7 I.R. 453. But if on a submission the arbitrator award the executor to pay a certain sum this precludes the want of effects.

7 I.R. 453.

Once determined that the payment of interest was such a promise as threw the onus probandi whether effects or not upon Executor &c. 5 I.R. 8.

But the acceptance of a Bill of exchange by the Executor &c. admits effects to that amount Chit 2. 82-3, 112, 1 N. 1st 622, 3 Wib 1, 2 Stra 1260, So also a transfer of a Bill by the holder's Executor is an admission of effects to that amount. Chit 11-2 3 Wib 1, 2 Stra 1263.

Mr. Miller's requiring such contracts to be reduced to writing, does not imply that if the promise is in writing they are bound of course for if the contract is unsealed the want of a consideration will vitiate at 7 I.R. 350 note.

A written promise under the Stat. will not bind him, the Executor &c. would have been bound by such a promise at common law 7 I.R. 350 note Rob.

Ob. 1 Ves 126,

To make the Executor &c. liable on his written promise there must have been an existing debt due from his Testator - ob. 206, note 2 Saund 136, Cro Jam 47,

And the consideration upon which the Executor &c. promise is made must appear in the writing or he will not be bound 5 East 10, Rob 116, 2078.

6 East 307,

and he would have been Administrator at the time of making the promise or he cannot take advantage of the contract's not being in writing, for if he promises to pay a debt if he is appointed Adm^r or if he is so appointed he is bound although his promise is not reduced to writing Amb 338, Rob. 201,

In an action against an Executor &c. on his written promise to pay a debt of testator you need not prove affects Rob 635-6,

b. As to the second clause... Any contract to answer for the debt Default or miscarriage of another.

Under this clause this general distinction must be observed viz. if the promise is original it is not within the Statute but if it is collateral it is within it and will not bind unless in writing.

An original promise is one where the party promising means to make himself the original debtor.

Collateral where he means to make himself a security only b L^t Ray 1087, Court 227, 1 Wils 306, 3 Bur 1888, 823 101-2,
This is the universal criterion to which there is no exception

1. First then a promise is original when the third person is not liable at all to the promisee such a promise is not within the Statute Peak Eq. 212, 3 Bur 1921, Rob 209, 216, Paul N.P. 281,

2. A promise thus made is original when the third persons liability ceases on the promisee's being made the sole recoverer has been doubted Rob 245-4,

3. A promise is original where there is a consideration arising to the promisee out of a new and distinct contract or transaction 3 Bur 1886, Rob 252 3 Bur 86 East 32d,

Generally whenever a novel promise is within either of the three above rules it is not within the Statute and of course binding.

But where the promise is merely in aid of a third persons subsisting liability as to procure further credit or where the promise is a mere guarantee it is within the Statute and void unless in writing 5 Rob 225, 8 Wils 75, 1 Hels 326, 13 & 15 8. 2 Eng 455,

To illustrate the three above distinctions.

1. Deliver goods to A and charge them to me, this

promise is original and need not be in writing
2 J.R. 80 171 Bl 123, La Ray, 1087, Rob 209, 216,
on the other hand deliver goods to A and if he don't pay
you I will have the promise is collateral and must be
in writing.

Supply my mother in law with bread and I
will see you paid him the promise is prima facie
collateral 2 J.R. 40-1, Rob 223, La Ray 224, 1 Rob & Full 158,
Cantab Salk 58,

2d Mansfield rule re Cawp 228-9, 2 J.R. 41, Rob 209-10,
Rule now is this that in a promise in this form i.e.
"I will see you paid the court consider all the circum-
stances of the parties at the time 1 B & P 151, Rob 212, 223,
What circumstances? I answer many. I says to B furnish
such a seaman with necessities for a voyage to Canton
and at the end of three months I will see you paid.
here is the circumstance of the probable absence of the
seaman at the end of three months. etc

I recommend B as worthy of credit, the trader says "I
dont know B" A says "you know me I will see you
paid. here the promise is collateral and within the Stat
2 J.R. 80, Esp Dig 101-2, Rob 210-1,
I promise if you will let your horse to B we shall deliver
him back. collateral, Rob 232, Salk 27, 6 Mod 24 & 2^a Ray
1085, 3 Salk 15, Watt 6061

It is a general rule that a promise by one that a third
person shall do an act which he contemplates in able
for that doing is collateral and void by the statute
2d Ray 1085.

But if I promise to do an act for a third person for not
doing which he is not liable my promise is original
and binding Rob 228

as if an agent buys goods for principal without
naming him Peak Inv. 2 15, 3 Bur 1921, see also La Ray
1085, Rob 217, 222, 232,

If a promise is made by one of several persons already liable
to pay the whole debt the promise is original Rob 228-9
5 Rob 225, Camb 302, 2 East 525, 2 Esp 484.

It is a general remark as to contracts of the second
class, that when the promise is original the proper
action is ~~Plaint~~ ~~affirmat~~. But when collateral
and in writing Special ~~affirmat~~ 1 Bur 373.
3 Lee 363, 2d Ray 1085

2 As to the second distinction. When the liability of ¹⁹
the third person is extinguished by making the promise
the promise is said (and I think correctly) to be original
3 Bur 1888, 1. New Rep 130-1; It is however doubted
by Roberts. Rob. 223.

A promise to purchase a debt against another is
clearly original. So I think a promise to pay
if he will destroy or discharge the bond is also
original and binding notwithstanding the Statute
Rob 226, 1 New Rep 130, 2 East 325,

3 As to the third distinction. Where there is a consideration
arising to the promisor out of a new and distinct
contract. the promise is original. The leading case
on this subject is that of *Wms vs. Leaper* 3 Bur 1886,
see also Peak Ev 213, 2 East 32, 3 Eng Cas 86, Salk 25,
28, 2d Ray 75-9,

When a person is under a prior moral obligation
to do an act for another a subsequent promise to pay
a person for having done it is original and not
within the Statute. But N.P. 231, Peak Ev 213.

(100.) Some general cases and the Second Class of Contracts.

A promises to pay B a certain sum if he will withdraw
an action of Assault & Battery which he has pending
against C. The promise is original for it is not the
debt of another untilt segment. 1 Wils 305, 2 Day
454, 7 T.R. 2d 4, Rob 207, 235, Peak Ev. 214
And it is a general rule that to make a promise
collateral there must be a debt or, ascertained
or capable of being ascertained at the time of the
promise is made (some auth.)

A promises to pay B £1 if he will stay a suit for an
existing debt against C in Collateral 2 Wils 97, 3 Bur
1887, 4 Eng L. 2d 1, Atta 873,

So also if he will withdraw an action of trover, for this
the rule is only that when he stays £55, see also on the
subject 1 T.R. 557, 4 Bur 348, 6 Eng L. 2d 5, 7 T.R. 121,
It is said that when there is a new consideration a novel
promise to answer for the debt or is good. But 2d Ray 28 Bur
1887, and not clear if it were every promise would be good

20 and this clause of the statute in effect required
2 Wils 94, Rob 238, Bur 181-2, 7 J.R. 281, Stra 873,
2 Eng 257.

But judicial confession of a parol promise as it excludes
the necessity of proof will take a parol promise
out of the statute for now no danger of perjury
and besides the statute was not made to prevent what
happens a party ^{suspending} himself by swearing against
his own interest. And it is a general remark applicable
to the whole statute that the parol promise is not
void by it but merely the proving it by parol
testimony if it could be proved ^{by other evidence} the promise is good
Each R 75, Peat Es. 284, Rob 238,

Rules of pleading, see title Pleading. I will merely state the
general rule here. If a collateral promise is made
in writing ^{or not otherwise} the party in declaring on it need not
swear that it is in writing Ray 450, Bur 180, 279,
3 Bur 189, Couth 289, 12 Holl. 540, 4 Bur 553, that
it must be averred in a plea in Bar re. 2 Wils 49,
Bur 180, 279, Rob 202, note.

And when the collateral promise is parol and not averred
to be in writing a Damnum to declaration will
confess it to be in writing 75 R 358 note 1 that 47-8,
A parol promise in one entire transaction to pay the
debt of another and also to do some other act the
whole promise is void. Because the promise is
entire and a person cannot recollect on a part of
an entire contract. 2 Bent 224, 7 J.R. 281, 204,
1 New Rep 130, Rob 172-3 note p 31,

3. As to the more usual or the statute promises in
consideration of marriage &c.

This does not include a promise to marry. The statute
relates only to contracts made in consideration of
marriage. such as 280, 1 Foss 174, 1a Ray 346, Stra 24.
1 Dow 277-8, 182 17618, Once 3d. 526, Such an agreement
must be in writing.
An agreement that the prior agreement shall be
reduced to writing does not take the written agreement
out of the statute 1 Dow 279, 2413 Once 3d. 402, 182 514,
But if such additional agree ^t was made and prevented
from being executed by the fraud of the other party

Equity will enforce the agreement on the ground of fraud. 1
1 Eyn Cas 19, Rob 198, 130-7, Prece Ch. 526, 1771. 6th,
No suit can be maintained at law, not because the parol
promise is void for equity will enforce that on the ground
of fraud. Stow 236, 2 Lew. 146, 1 Ves. Jr 196, Rob 197,

Statute says. Same note or memorandum in writing made
at the time agreed by the party bound. See
Hence any memorandum &c. although it is not a
binding agreement itself if it shows the terms of the
agreement is sufficient to take it out of the Statute
e.g. a letter written by one party to the other containing
the substance of an agreement 1 Frob 179, 2 Bro Cha 32
3 Bro Ch 318, 1 Ves. Jr 330, 1 Pow 247-8, 1 Bent 361, 3 Atk 573.
But where the writing is in the form of a letter it
must appear the other party accepted of the terms
contained in it and consummated the marriage or
did the act on that ground 1 Frob 179, 2 Pow 65,
9 Mod 3, 1 Pow 247, 290.

Hence where the letter had not been made when
the marriage took effect it was held not a binding
agreement or rather no agreement at all 1 Frob 198,
A letter to one's own agent stating an agreement
is sufficient memorandum 1 Atk 503, Rob 129.
But such a memorandum must furnish the terms
of the agreement or it will be defective for
uncertainty 1 Frob 179, Prece Ch. 560, Stow 426,
1 Atk 129, 1 Pow 290.

1st. As to the joint clause of the Statute for the sale of lands see.
Under the joint lands which includes things annexed
to the land yet if they are sold for the purpose
of being severed the contract is not within the
statute and need not be written e.g. as contracts for
trees, corn, grass &c but for rototiller in the ground
it is said it must be written. 6 East 602, Held 1846,
11 East 362, 175 & P. 344, 1 Com. 601, 44, 8 C. 3 Day 670
Peak Law, 2 Th, But 1 P. 42,

Hence it has been determined in this state that a
parol sale of a running gear of a mill ^{as good} unless it
was to be severed 3 Day 670

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A parol contract between the owner and occupier
of Lands that each shall have a share of the profits
is good 1 Ch & P 397,

A parol promise to pay money for the conveyance
of Land is good 4 Root 477, 479,

It was formerly held in Court that the action of
Breach of Promise would lie to recover the
value of Land sold on the quantum valebat
but this is now overruled.

But notwithstanding the Statute there are cases
where a parol agreement in such cases will be
binding as if a parol agree^t is proved consistent
with the Statute i.e. without parol evidence

First where there is no danger of fraud by perjury
as where in a Bill in Chancery the respondent
in his answer confesses the contract to have it
shall be enforced for there is no danger of
fraud or perjury. and not much danger that
the debt will perjure himself by swearing
against his own interest 1 Ves 221, 441, Pre.
Ch 208, 374, 2 Atk 100, 155, 3 D & B, 1 Bl R. 600,
2 Bro Ch 568, Emb 586,

Powell says the Statute is complied with because
the promise is now reduced to writing very
strange! Is there any note or memorandum made
at time and signed by party? I think not.

It has been determined that if the defendant
confesses a contract in his answer but in his
plea insists on the Statute he is not bound
by contract Rob 15-6, 161, 2 Bro Ch 506,

4 Ves 223, Peak Ev 216

On the other hand It has been determined
that if insists on the Statute in his plea after a
confession of the contract it will avail him nothing
and he is bound by his contract after it is proved
Peak Chan 374, Peak 216, Rob 15-9-0, 3 Atk 3, 2 D.

155, 2 Bro Ch 508, 1 Bl R 600, Contra see decisions
at law 2 W Bl. 63, Rob 15-7, 6 Ves 9c 548, 4 Ves 223,
2 Bro Ch 563-4,

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In 2 Bro Ch 5, 4th There is a case which is frequently misunderstood. The agreement in this case was not denied nor was it acknowledged but the Lord Chancellor expressly says this is not the ground on which he decides but it is on the ground that the agreement was unintelligible if it was proved.

Question. Whether on a Bill in Chancery for the specific performance of a parol contract for the sale of lands the debt after confessing the Contract in his answer can avail himself of the Statute by insisting on it in his plea.

Vide Moot Reports. Succed he could not be Gauld On argument &

If this question is doubtful, the following which I think depends upon it is also doubtful viz.

Whether the Debtor is bound in his answer either to confess or deny the parol agreement / 1 Fonc 168, 170, 2 Bro Ch 566, Mitt Ch. 211-2, Rob 156-7,

160, 2 Atk 155, 4 Ves 24, 2 N. Bl 68, he is bound (107) On the principal that if the parol cont - can be proved without danger of perjury it will be enforced. It has been determined that a parol sale of land or by a Master in Chancery under an order of the court is good 1 Ves 218, 220, 1 N Bl 289, 1 Bro Ch 334, Rob 115, because the master is a confidential officer of the court. (3 Bro Ch 334.)

According to some very respectable opinions, if a parol contract is inadmissible from any notorious fact it is good. Thus an absolute deed may be proved a Mortgage. As of one receiving the deed & executing his note ^{to him} for the sum contained in the memorandum & pay interest on note. remains in the possession of Land, say, taxes &c. a court may infer and the party has a right to prove by parol testimony that it was meant for a mortgage / Pow. Mort. 65, 3 Woodes. 429, 2 Ves 376, 2 Atk 71, One ch 526 Talbot's Ch 60, 1 P.M. 381, 2 D. 54, 1

This rule once recognized by Superior Court in this state. Samuel vs. Wadsworth, but their decision was reversed by the Supreme Court of Errors.

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There are other exceptions founded on the principle that a Statute made to prevent fraud ought not to be so construed as to make it prohibit fraud. Such would be the case if by not performing his Master's agreement he would practice a greater fraud than the Statute was made to prevent.

On this principle it is held that part performance of a parol contract for the sale of lands etc at the request or with consent of the other will take the promise out of the Statute for otherwise there would be an additional fraud.

As if A makes a parol lease to B and B enters in pursuance of it and erects buildings and makes other improvements. This is such a part performance as will take the contract out of the Statute 1 Foulb 172, 1 Pow 296, 1 Bl & C 650, 1 Rob 221, 83, 297, 3 Attk 100, 7 Ver 341, 3 do 378, Rob 130-4, 3 Woodes 433, 5, 1 Pow Cha 417, 4 Bl & P. 397,

Delivering possession of lands etc, by vendor in pursuance of a parol agreement is sufficient part performance on his part to take the contract out of the Statute 1 Pow. 299, 300, 2 Ver 363, 455, 2 Eng Gas. 48, 1 Pow 783, 3 Bro. Cha 409, Pow Cha 5-18, 7 Ver 747,

On the other hand payment of part of the purchase money in pursuance of a parol contract for the sale of lands etc. is sufficient part performance for the vendee to entitle him to a conveyance. 1 Pow 304-5, Rob 153-5, 3 Attk 2, 1 Ver 43, 222, 1 Foulb 175, 4 Ver 42 720, 3 do 413, Rob 153-4, Doubtless see 2 Sq. Cas. 46, Sugden 74, 81, 9 Ver 234, Comin Con. 42,

Payment of earnest is not a sufficient part performance. It is not an act done after the agreement and in pursuance of the terms of it but merely an additional solemnity to the agreement Pow Ch 560, 1 Foulb 175,

Sowell indeed observes that damages for the non performance may be recovered where there is earnest paid but I don't see on what ground unless he means that the money paid in earnest is the measure of damages! Pow 308.

May a receipt of part of the money be proved by parol? Yes, for its idle to say (if part performance will take it out) it must be proved by written evidence for there is no need of proving part performance 1 Pow 307, 3 Attk 4, 183-4,

But to take a parol agree^t out of the statute by part ⁹⁵
performance the act done must have been one by which
if the agree^t is not enforced he will be prejudiced
Hence part performance by one of the parties will not
make the parol agree^t good as to the others. 7 Ves 734,
Rob 138, 6 Bro. Parl. Cas. 45,

Again, the act done, must have been done with a view
to part performance.

Thus, A lessor agreed with his lessee to give him a
new lease after the first should expire. The lessee
held over. This was adjudged no part performance
for it did not appear to have been done with that
view. 3 Ves 378, 1 Pow 309, 2 Bro. Ch. 561, 1 do 412,
1 Foss 175, 3 Atk 49.

But giving directions for the performance of a parol contract
concerning land &c. having it plised, surveying it going
with the vendee to where it is, is not a part performance
1 Foss 175, Rob 139, 162, Amb 586, 1 Bro. Ch. 412, 3 Ves 47
3 1, 379, 6 do 413.

But on a parol contr^t in consideration of marriage
the act of marriage is not of itself part performance
for that would repeal that clause of the statute
1 Pow 309, 1 Bac 74. Pow 66 561, 3 Ves 734, 1 P. W. 618.
Rob 196-8,

It seems however that a parol contract made by a
third person would be taken out of the statute by
the marriage itself if the marriage took effect
by his consent 1 Pow 294-9, 2 Vern 373, 1 Pow 309,

The cutting down timber trees on land has been
held (if for the purpose of clearing it) to be a
sufficient part performance by that party who
did it or contracted to do it. 2 Eq. Cas 29, 1 Pow 304.

On the ground of preventing fraud a written contract
may itself be contradicted by parol evidence 3 Atk
389, 1 Foss 188, 1 P. W. 620, 2 Atk 203, 1 Eq. Cas 20,
1 Pow 294,

Again a parol agree^t of any kind may be proved
where it is only the inducement to the action
of fraud.

As if there is a written agree^t for the sale of a
chattel and the vendor warrants it sound by parol
how the parol agree^t may be proved in contradiction
to the written 2 Day 531, for exec^t in power of Chancery.

An action of Indeb. Assumpsit will lie for use and occupation of Land under 11 Geo. 2nd and a Novol Lien may be proved not for enforcing an agreement but ground a recovery for the use see Est. Dig. vol. 165, b. 3. P. 322, 1 Ado 378, 2 Bl R 1249, 1 Wilts 314, 17 Bl 235, that assumpsit would not lie at common law see Hob 284, Chit. Pl. 97, Bul. 82. 137, Peak Ev. 241,

In Cont. we have no such stat as 11 Geo 2 But our courts have adopted the rule and principles of it. 1 Day 22. 8, 5. & to the fifth clause of the statute. Courts not to be informed in one year from the making.

This clause does not extend to agreements concerning lands &c for such agree^t the statute had already provided, Pow 276, 1 Geom 159, 8 J R 327,

But where the performance of a contract is to take place on the happening of a contingent event which may or may not happen within a year it is not within the statute as a contract to pay when a certain ship shall return from the East Indies Salk 208, Bul. 13. 24. 12. 506, 3 Bur 1278, 3 Salk 9, Peak Ev. 214, So a promise to pay a sum of money on the marriage of another 1d Ray 316, Rob 187.

So parol promise to leave a sum to a person in his will on Death 3 Bur 1278

And in no case where the parol contract may be performed within a year is it within the statute even though it was not so performed. 1d Ray 317, 3 Bur 1281, Peak Ev 214,

This clause extends only to such contracts as are not by the terms of them to be performed in a year

In Cont. it has been determined that where the Cont. is made on a continuing and accruing consideration it is good if it is to be performed within one year after the consideration has ceased to accrue

As where a father contracted with another by parol to Board his son five years this was held good if to be performed within six years from the making 1 Root 49,

I find no such distinction in the english book.

102) Rules applying to all classes of court in the Statute. 27
The construction put upon this statute is the same in
Law and Equity 3 Bl 433

"Same note or memorandum of the contract must be
in writing" the form of the writing is not material
1. Frob 179, 1 Pow 287, 2 Bro 62 32.

But the writing must show the terms of the contract
with certainty or refer to something by which they
may be made certain 3 Bro 62 318, 1 Pow 287, 2 Bl
a D. 23 d. Rob 115, as if the writing states that the
conveyance is for the same price that I gave for it
the writing is sufficiently certain

But if the thing referred to will not make the terms
of agreement sufficiently certain it is void and the
terms cannot be explained by parol evidence to make
them more certain. 1 Pow 287, Rob 108 note

An advertisement is a sufficient note see 1 Bl 2599,

3 Bur 1921.

The consideration as well as the promise must be in
writing except under the sixth clause of the English
statute where the word bargain is used which is
held not to extend to or include the consideration
5 East 10, Rob 116, 287, to exception see 6 East 287,
it is immaterial in what form the writing is. Thus a deed
involving an such may be construed as an executory
agreement to convey as neither is considered as evidence of
of such agreement. But this only in Equity 2 Bl 242, Hob 109

The agreement must be signed. What is a sufficient signing?

If the name of the party is written in the body of the
instrument by himself or authorized agent if it appears
to be done with intent to give the instrument effect
it is a sufficient signing 3 Lev 1, 48, 9 Pow 287,
2 Bl 287, 18th Oct 1903, Chas 399, 1d May 1916,

But if it does not appear to have been done with an
intent to give the instrument authenticity it is not
a sufficient signing 1 Frob 1667, 10 Bl 771, 1 Pow 285, 2 Bl 12
Formerly thought that the making an alteration in an
Instrument was a sufficient signing but now overruled
1 Pow 220, 1 Frob 1656, 1 Bl 771, 1 Pow 284,

But other signature as a witness where he knows the contents
of the writing, to any stipulations in it on his part
he is bound 1 Pow 6, 1 Wil 18, 2 Bl 123 4.

It is a rule that if the party against whom a

28. That is brought has signed he is bound although
the other party is not 1 Bro 66 564, 9 Pow p 331, 1 Pow 266
2 Bern 373, 1 Eng Bar 20, 2 Bl 32, 7 Pow 4263,

It is said in the last case cited that one's procuring
another to sign is a sufficient signing on his part
of Pow 247, I can't see the reason of the decision.

The bringing a Bill for performance is a sufficient
acknowledgment of a contract although the Bill
is withdrawn 1 Ver 429, Rob 124,

I have seen note that in a case reⁿ acknowledging the name
of the signatory adder is a sufficient signing for
both parties. Bul 187 283, 1 Bl 3577, 3 Bern 1921,
lately been decided see. 8 & R. 151, that the old rule
holds as to sixth clause of english statute see
1 Eng Pl 187, 1 Bl 387, 16, 1 Ver 344, this even
doubtless see 9 Ver 429,

It is questioned whether such a contract need be
in writing Bul 187 283, 1 Bl 3577, 3 Bern 1921.
A printed name may be a sufficient signing
2 Bl 387 238, Rob 124.

Where a contract is signed by an agent it is not
necessary that her authority should be in writing
3 Wooton 427, 9 Ver p 251,

It is not necessary that the identical contract be signed
it is sufficient if an acknowledgement that it is
his intent is signed by the party 3 Bro 66 318,
Rob 121, 2 Bl 383,

The bare writing an agree^t by the party does not
dispense with his signing it 1 P. N. 170, - - - - -

The Consideration of contracts -

The Consideration is the material cause of a contract.
2 Bl 443-4,

There are two kinds of consideration viz. Good & valuable
A good consideration is that of kindred or natural of
filiation between near relatives 2 Bl 297, 444, 3 Coke 33,
1 Pow 361, A good consid. in Court executed is good
between the parties, but as against Creditors it is
in general construed fraudulent 2 Bl 297,

An executory contr. on good consid. cannot be enforced
a law, but in Chancery will be in many cases
1 Ver 425, 2 P. N. 176, 1 Pow 361, 367,

A valuable or valid conveyance is something of ²⁹ ~~mechanical~~ nature as money, goods, Marriage see 3 Coke 83, 2 Bl 297, Contracts are divided into two kinds, special and simple, there are at common law no intermediate kinds 7 & 8 35, Special is one that is evidenced by deed or contract sealed.

Simple is one by parol or reduced to writing but not sealed. 2 Bl 465, 295, 7 & R. 35, note Rob. F.C. 94,

In Cont^t any written instrument containing an express stipulation is in general treated as a specially.

All simple contr^t i.e. (contr^t by parol or written and not under seal) which are executory are void if without consideration 1 Pow 330, 335, 2 Bl 445, Salk 1 h. 7, 5 & R 143, 1 Fosc 326, 333,

A contr^t it is said when reduced to writing is good without consideration 3 Bur 1670, 2 Bl 446, but this is not law 1 Pow 333, 2342, 2 Co 242, But negotiable instruments which have been transferred are good without consider^t but these are governed by mercantile law Chit. B. 9, 51-2, 7 & R 351 note,

In strictness a consideration is necessary to seal an instrument but the Pif^t is not bound to prove consideration nor is the Def^t permitted to deny it i.e. he cannot prove the want by parol evidence so that whether necessary or not the deed is good. 1 Pow 514, 3 Bur 1637, 1 Pow 232, 1 Fosc 334, 2d Ray 729, 1550, 2 Bl 295.

The Deed is binding unless the want of a consideration appears in the instrument itself or some other of equal authority Rob F.C. 95-7,

(103) The rule requiring a consideration to every contr^t applies only in its full extent to executory contr^t for if executed it is good without consider^t as between the parties 1 Bac 234, Doug 20-1, Ctra 955, 2d Ray 577, & consider^t it is said can arise only in two ways
1st From something advantageous to the party contracting
2nd Or disadvantageous to the party in whose favor the contr^t is made 1 Pow 342, 1 Fosc 330. But this rule is too extensive as I shall try and by show,
1st First a consider^t may arise from something advantageous to the party contracting but

30. By the way the quantum of the consid. is wholly immaterial provided it have any value 2 Verm.
213, 2 Pow 152, 1 Hob 230, 2 Ves 5-18,

In this an insufficient consid. is not considered as a consid. in Law 8th D. 94, 2 Roll 23, Cro 8 Liz 2. 06.
But any act however trifling done by that party whom favours the promisee is made a sufficient consideration 1 Pow 343, Cro 8 Liz 67, 150, Cro 8th 47.

And the mere relation of landlord and tenant is a sufficient consideration 5 T.R. 373,

2^d Secondly a consideration may arise from something disadvantageous to the promisee even if it is of no advantage to the promisor. but an act taken by itself must be disadvantageous Hob. 4, 53 Cro Pow 342, Cro 8 Liz 74-5, 149, 181, Hob 216, Couch 124.

As a consequence of the first general rule it follows that a consid. will not arise from any thing already past & executed for nothing of advantage can occur in consequence of such a promiss. which is already past 1 Pow 348, Cro 8 Liz 741, 885
442, 8th Dig 95 87, 1 Roll 11, in part
But though a past consideration is executed yet if past be subsisting at the time and not past the promisee is binding 2 Buls 73, Cro 8 Liz 94,

3 Salt 96, Cro 8 Liz 409,
The general rule that a consid. must arise in one or the other of the above ways is to no one and is now somewhat relaxed 3 Barr 1671-2, Stree 933,
Hutt 47. Thus a contr. on a consid. almost past is good if there was a previous legal debt or duty incumbent on the promisee as a promise by A in consideration that B had buried his child here the buried the child was a previous duty of A. 1 Pow 353,
2 Ray 260, Cro 8 Liz 157, 3 Barr 1671-2,

Again if there was a prior moral obligation on the promisor the promise is good as a promise to pay a debt barred by the statute of limitation to pay 259, 2 1st 445, Couch 290-4, 8th Dig 95
1 Feake 338, Ray 259, 2 1st 445, Couch 290-4, 8th Dig 95
Bul. 8th 147, 2 81, Peake 213,
So a promise to pay for the former nursing of a natur-
ed child is good. 2 East 506.

Again a consider. part will support a const. if the consideration were at the request of the promisor. here the promisor couples it self with the part ^{or request} & ^{to} const. v. 68, 3 Salt 96, 1 Abt 105, Bro 42 40 & Bro 200 1st, Bro 812 41 Bro 24 2nd, Esp Dig 92, 1 French 336.

It has been held that a promise to a stranger for a meritorious act done by another will not support an action in the strangers own name for he is a stranger to the consideration. Thus A has transferred an B and in consideration that B will discharge him of it says I will pay A such a sum the promise it is said is not binding 1 Pow 343, 353, 4 J.R. 330, Bro 200 687, 2 Roll 441, 579, 1 Bent 6,

This rule is now confined to deeds. That it does not hold in simple contracts see 3 B & P. 148 note see also 1 B & P. 137 & 1 Johns 148, & Mod 117, Bowd 442, 5 Bur 2680, 1 D.R. 659, & that it does hold as to debts see 3 B & P. 148 note & Lee 139, Bowd 77, Bro 812 729, 1 Lee 235,

It was always held that a consid. moving from one person would support a promise to a third if he was nearly related 1 Bent 318, 332, 2 Lee 210 Esp. Dig 302 1 Pow 353, but now extended to all simple contracts whether nearly related or not.

Where the promise is in consid. of the forbearance of a suit two requisites must be observed

First it must be to forbear the suit perpetually or for a certain fixed period. Second. it must be of an action to which he is liable - meaning a recoverable liability on his part both these requisites must concur 1 Pow 353-4, Bro 812 206, Esp. Dig 95.

As to first requisite. forbearance for a reasonable time is a period sufficiently certain. Bro 812 19, 455, 1 Pow 353-4, Esp. Dig 95. Nutt 108

As to second requisite. If one is arrested on a void process and promises in consid. of a release from from arrest to pay a certain sum the promise is void. 1 Pow 135, 3 Salt 96, Hardress 73, Esp. Dig 94, 1 Abt 108.

But the promise is good if there is a recoverable liability to a suit later than 1 Pow 356,

But if from the terms there is no liability the promise is void 1 Pow 157

The mere act of trusting property with another is a sufficient consid. for a promise to some act concerning it 2d Ray 909-0, 919-0, Bro 200 657, 5 J.R. 143, Salt 26, 3 Do 11,

3² The preservation of the honor and peace of a family is in themselves sufficient consider for a promise 1 Act 3, 1 Pow 362,

For a companion of a doubtful night is a sufficient consider. 1 Act 10, 2 Inst 353, 1 Phenix 4, 2 Rec 284,

It is not necessary that the consideration should be expressly stated to be such 1 Rec 450, Pow 368, in most cases in these instances.

1. When the thing stipulated to be done on one side is in consist of performance on the other the performance is a condition precedent, thus A agrees to pay B for building a house his building is a condition precedent to payment. 7 I R 138, 1 Bent 177, 214, 3 Salk 95, Nob 106, 1 New Rep 240 note 1 Dant 380, 1 Will 374-5, and 1st before payment shall be paid 274-5.

But what is equivalent to performance will answer the same purpose as performance, thus if one party tendered performance this is equivalent 1 J R 638, 645, 2d Ray 686, Doug 259, Stra 1236, or if he was at the appointed place and was prevented from performing by the absence of the other party whose presence was necessary or indeed if he was prevented from performing in any way by the other party he has did that which is equivalent to performance 1 East 203, 208, 619, Stra 450, 7 J R 125, 2 New Rep 242, 6,

(104) Where the parties on both sides are concur-
rent, as if I promise to sell to B a load of wheat
on such a day for such a price here the sale must
be made at their stipulated time whether the other is
done or not. 1 Sanc 320², 2 Inst 347², 1 East 203,
619, 629, 7 J R 125, 2 Ado 761, 8 Ado 566, 1 Will 363,
If one promise to do an act in consid of something to be
performed the performance is a condition precedent
but if the consid is to be paid on a day certain then
performance is not a condition precedent for the consid-
erment to be paid at the day whether there has been a
performance or not. 1 Sanc 320², 1 Dant 381, 2 New
Rep 240², 7 J R 138, 6 Ado 572, 2 Will 389,

But if the day of payment is after the act is to be performed performance of the act is a condition precedent and must be answered and proved in an action for the money 1 Pow 358, Salk 171, 3 Salk 98, 1 Daud 320.
2 New Rep 2 30^b

3. Where the promise on one side is in consideration of the promise on the other here the promises are independent and an action may be brought on either side without avering or proving performance ~~on the other~~ 1 Pow 359, 360, Doug 665, 1 Bent 177, 2 14, Hob. 8^a, 1 Salk 24.

But a court of Equity will not enforce such an agreement on either side unless the party applying has performed or is ready to perform his part maxime. In that event equity must do equity 1 Foub 382, 7 Bro Parl. Cas 1843.

I promise in this form "I promise to pay \$100 you transferring stock to me on such a day. I think ^{the} transfer a condition precedent see Salk 112 1 Foub 382 1^a Mod 573, 1 N. Bl 279, 4 T R 761, & do 371-5, Contra that it is independent see 2 B&B, R 1312,

The consider shall be so construed as to arrive at the object and meaning of the parties Doug 665, 1 T R 645, 6 do 570, 668, 7 do 130, & do 373, 2 Wm Oct 240^a.

I remarked that if the promises are independent either or both may sue at the same time without avering performance Doug. 665, 1 Foub 382, Doug 56, 3 Bent 41, But English Courts of Law have of late been called against construing promises independent 4 T R 761, & do 371, Wil 496, 1 East 679,

Mutual promises must both be binding on neither of them will be so. that is binding in spirit of law and generally they must be binding in respect of fact exception mutual promises between an Infant and an Idiot Salk 24, 1 Pow 360, Hob 8^a,

By Com. Law fraud in the consid of a court by itself will not vitiate it but fraud in the execution of such a court makes it void. reason, in the latter case there is no agent in the former there is. 2 Bl 324,

2 Coke 3, 9, 11 Coke 27, 2 Lev 422,

To illustrate the rule A. n B. an unascert H. for a sound one and B. gives his Bond for the value

34 here the fraud is in the consid. of the bond
and does not vitiate it. But if the bond was
falsely made the fraud is in the bond itself
which makes it void.
But a Court of Equity will relieve against a
fraud in the consid. of a bond or specialty.
2 P.W. 283, 3 to 290. 2 Pow. 145,
And the rule was the same at law in relation
to all cont. executed as it was with relation to
Deeds or specialties and that the party must pay
and take his remedy for the fraud in another action.
But now the rule holds only as to Deeds or specialties
Peake 8o 233, 1 Compl. 39, 190-4, 4 East 95, 4 Johns 453,
See further on this subject Title Action on the Case No. 74.

Our Courts hold that when the fraud is in the
condit. of a cont. by specialty and total i.e. the
condit. of no value that the instrument is void
at law. 1 Root 58, 305,

Language of a contract
Is to ascertain the intention of the parties to it
and whenever language in contract may be it does
not be construed beyond that intention 1 Pow. 172-4,
Every word is to be construed to the full extent inten-
ded if the language will admit. 1 Pow. 372,
The language is to be understood according to its ordinary
signification unless there are special reasons to the
contrary. Why? because so they are generally used
and so they are supposed to mean them Broth 346,
2 Kent Rep. 213, Pow. 86, 1 Pow. 374,

Words expressive of quantity are construed according
to their meaning at the place where used Shephard 172
1 Pow. 376, G. thinks this rule will not hold where the
contract is to be performed at another place. 2 P.W. 88,
676, 1 Pow. 437,

Where the language is ambiguous its meaning may be
collected 1st from the subject matter 2d from the effects
of an opposite construction 3d from the circumstances
attending the transaction.

First Subject matter, as in a covenant of non-suit
shall be construed to extend only against better
title. See 425, Bro. 812-3, 1 Pow. 103, 379. 388-9,
I gather from necessity that it may have some effect

may be construed to be a totally different instrument from what it purports to be as if a joint tenant make a deed of feoffment to his co-tenant as this cannot operate as a feoffment it shall be construed to be a release Ray 187, 2 Daud 96, Bro Eliz 352, Stat 5-74, 1 T.R. 446,

Second. If construing according to the ordinary meaning would defeat the court Courts may invert the meaning as. It gives B a receipt for \$100 and concedes it by saying "which I promise never to pay" this shall be construed a receipt for \$100 payable immediately 3 Lev 211, 1 Pow 382 or the same principal strict words of condition may be construed as a limitation 2 Bl 155, 1 Bent 202, Bro Eliz 205, 1 Pow 382,

Third. The circumstances attending may serve to explain that which by the terms is doubtful 1 Pow 388

If one having goods in his own right and other goods as executor of another grants all his goods the grant shall be construed to extend only to the goods in his own right 3 Mod 278, 1 Pow 388, Litt sec. 535-6-7, Bro Eliz 705,

(185) There is a rule for construing releases or discharges peculiar to this instrument viz. Where in a release there is a recital of a particular claim followed by general words applying to all claims the latter general words are qualified by the former as if A having a judgment of \$100 and a Legacy \$5 due from B should make a release to B reciting the legacy and conclude "in full of all demands it shall be construed to be a release of the legacy only. Hob 74, 3 Mod 277, 2d Ray 663, 1 Pow 391-2, 1 Eq Cas 170, Eng Dig 2d 3, 1 Lev 99, Barth 11.

But on the other hand where the release uses the words "in full of all demands without specifying any particular demand it is a discharge of all debts whatsoever 3 Mod 277, Barth 117, 1 St. Tr. 158, see contra 2 Roll 409,

If the contract subject to the preceding rules is still dubious the words shall be construed most strongly against the grantor or person using them 9 Coke 7^b Pow 1403, 161, 171, 289, 1 Pow 345. But there is an exception to this rule in the construction of a general Bond 5 Coke 22-3, 1 Pow 450. Hence one bound in a general bond to pay out and account if there are two feasters by that name

the bond is payable at the last one 1 Pow 397-8
Perk sec 775, 1 8th Bar 18, 1 Pow 450,

Another exception is where the application of the rule would occasion an injury to a third person
as if a tenant in tail leaves for life without mentioning for whose life it shall be for the
life of the lessor for if for the life of any other
person it might be an injury to the issue in tail
1 Inst 4th 1 Pow 400.

Subject to these rules the language is to be con-
strued according to its general acceptation
1 Pow 1 Pow 400.

However when legal language is used it is to be
generally understood according to its legal sig-
nification 2 Roll 253, 1 Pow 402, Hob 217,

In agrees to pay what shall be proved to be due
is construed to mean what shall be judicially so
proved Hob 217, 1 Pow 405.

Contracts shall be construed according to their
general intent though it be opposed to some
particular intent as where land is given in trust
to raise a portion for minor children from the rents
and profits and it is found it cannot be done with-
out selling it it may be sold. This rule is ap-
plicable to all kinds of instruments. Bro 8th 43, 615,
1 Pow 403.

Where one has stipulated for the delivery of an article
to another which is not delivered at the time the
value of the article when it should have been de-
livered is the rule of damages in an action for the
non-delivery. To this rule one exception. If the price
of the article has risen since the time when it
should have been delivered the rule of damages
shall be the enhanced price. 1 Vern 217, 1 8th Bar
221, Stra 406, 2 Bur 1010, 2 Inst 211, 2 Vern 394,

If several deeds are made at the same time
between the same parties concerning the same thing
all of them shall be considered as parts of the
same contract - instance - A mortgage with
a separate leasehold 2 Vern 518, 1 Pow 410.

Concerning binding discharging or waiving Contracts
And here I would remark that a contract until

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accepted on both sides either party may retract his offer but when once accepted it becomes a complete contract and either may compel performance or recover damages for nonperformance 3 T.R. 653, 1 Pow 334 2 Bl 41, Nob 41, e.g. A meets B in the street and offers him \$20. for his watch while B is deliberating. If B withdraws his offer there is no contract but if B before withdrawing the offer says "I will take it" and offers to perform the contract is good and binding 2 Bl 347 2 Dce 241, Nob 41, 2 Pow 6, -43

If upon such an offer unaccepted earnest is paid or a
further time for performance is appointed the contract
is good and if the property before the time for performance
is sold to a third person who knows of the contract
it is no sale. But if no part payment is made no
earnest given no delivery had no time appointed for
performance and the parties separate after making
and accepting the offer the contract is at an end
and not binding. 2 Bl 447, 1 W Bl 368, 2 00 316,
1 Pow 231,

Again if A agrees to sell goods to B provided he
should wish to take them on the morrow morning
and B in the morning should give notice that he
would take them still there would be no contract
for contracts must be mutual both must be bound
or neither and in this case only one is bound -
3.J.R. 653, re contract Pow 261, but wrote before this
case was determined. I now think this case good law
as I doubt it.

But when a contract is actually complete
Before a right of action accrues on a simple contract
the parties may waive it by expressing their
mutual assent to do it for them there is no con-
nute right to discharge Com Big Pl. 2 Ch. 13, Cro.
Ch 3 & 3, 1 Pow 412, 2 Lev 144, 1 Mod 259, 12 D. 53 X,
But after a right of action has accrued even a
simple contract cannot be discharged by mere agree-
ment unless by deed or special contract, I say
merely agrees for if there is a new agreement executed
it will discharge it for it amounts to an accord
and satisfaction 12 Mod 583, Cro 6th 3 & 4, 2 Mod 44,
159, 1 do. 259, 1 Pow 412, 416,

Exception. A Bill of exchange accepted by drawer may be discharged by another agent, but these are governed by mercantile law. Chit B. 43-4, 8th Dig 47, Doug. 235, 247.

38 But though a bare agree^t will not discharge a
wasted night still a long omission to claim under
it will in some instances. but this is on the ground
of presumed abandonment 2 Eq. Cas 207, 9 Mod 2, 3,
2 Bro. Parl. Cas 116, 2 P. W. R. 2, Skim 409,

And an agm^t if consummated and executed
may be rescinded by one of the parties only
where there is a provision to that effect in
the contract itself 1 & R. 135, Corp. & 18, Doug 23.
2 East 145, 3 Ent. &c., 1 New Rep. 35-1, 72 & R. 201.
Mr. Powell says if a contract with B for such a
price as a third person shall name they cannot
rescind the contract. 1 Pow. 415-6, This is contrary
to principle and I presume not law.

(106) A release may be either express or tacit -

In express release is one by Deed or instrument
under seal. It is one which is implied from delivering the
instrument up to be canceled. 1 Pow. 4,
If one prevents the other from performing the party
prevented is discharged. Mr. Powell says the contract
is canceled or destroyed. But I think the party
preventing is still liable to perform his part of
the agm^t 6 Coke 91-2, 1 Inst. 206, Bro. 8 Eliz. 374,
1 Pow. 265, 416,

And the party prevented is in the same con-
dition as far as regards his rights under
the contract as if he had performed his part.
1 Inst. 213 & 1 Pow. 417-40,

A contract by Deed or Specieally cannot be annulled
or discharged by mere agree^t maxin - every
instrument must be discharged by one of as
high a nature 6 Coke 44, Bro. Jam. 254, 2 Selv. 192,
1 Chanc. 291, note 2 Wilts. & 6, 376,

It is said even payment of a bond or accord & satisfac^t
is no discharge but payment of the money due
on a bond discharges it. But this is merely
a distinction in pleading Bro. Jam. 254, 2 Selv. 192,
7 Mod 144, 6 Esp. 43-4, Bro. Jam. 99, 650, Bro. 8 Eliz. 46,
When the right and obligation coalesce or meet
in the same person the one is discharged.

c. g. when the obligor in a Bond is made executor 39
the obligee again. When the obligor and obligee
intermix. & Coke 130, Salt 300, 2 Pow 254-5, 9. Hob.
62, 3 Bac 679, 1 Pow 438-9, 444,

A contract may be discharged by a statute law
hence if before the time of performance the act to
be done is prohibited by a statute the contract
is discharged Salt 198, 8. Mod 51, 2 P.W. 218,
so also by the act of God 10. Hob 268. 1 Bick 98. 1 Pow 446,
hence if A buys a horse to B to be returned on
such a day, if the horse dies by disease without the
fault of bailee before the time of delivery the contract
is discharged Psalm 548, 1 Pow 447-8,

So also if one is bound in a general bond to convey
land to another at such a time and dies before
the time the manumission is discharged but a court
of equity may compel the heir to convey 1 Eq Cor 18,
The act of a third person cannot regularly vary
or discharge a contract. 1 Pow 481,
But where a contract by the terms of it is to take
effect, be varied or destroyed by the act of a third
person then his acts will affect it so far as provided
for in the contract. as if A contracts to give for a
thing what B shall say it is worth 1 Pow 495.

A contract may be annulled by a new contract of a
higher nature for the same thing. The simple
contract is said to be merged in the specialty
And so a specialty may be merged in a judgment
6 Coke 45, 3 Bac 134, 8th Dig 164, 3 8-1, 251,
The true reason for this rule is that it is presumed
to be the intention of the parties.

However if A should give his bond to B for a debt
against C. by simple contract C's debt is not
merged by A's bond for that is merely a collateral
security. 1 Pow 423 in margin Dyer 230.

A contract of any given degree cannot be extinguished
by a new one of equal degree. As if A should
give B a note for \$100 and the next day should
give him another note for the same sum for the
same thing the first is not discharged 1 Bar 9,
C. 8th 5-17, 817. Chit Ps. 62, 60. See 5-7,

The Deed is given by way of antenuptial it will discharge the plaintiff if it can be proved that the second note was given in satisfaction of the first. But the second note must be plead by name of account or satisfaction 1 Bore 136, 5 acte 17, 26 & 27 Eliz 5 Inst 232, 3 80, 251, 2 I R 26,
and where a copy of a lower note is recited in one of a higher note merely to corroborate the former. The contract of the lower note
is not discharged or merged and the deed may be given in evidence to prove the simple
contract reason the deed was not intended
to merge the simple contract 1 Bore 19, 1 Roll
118, 6m 8iz 6 44, 1 Bore 4 25, 2 18, 2 25,

The End of Contract.
Lichfield Oct^o 25th 1828
John Bates



















